

JOSEPH P. RUSSONIELLO (CABN 44332)
United States Attorney

BRIAN STRETCH (CABN 163973)
Chief, Criminal Division

DENISE MARIE BARTON (MABN 634052)
Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: (415) 436-7359
Facsimile: (415) 436-7234
denise.barton@usdoj.gov

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

)	CR No. 07-678 JSW
)	
UNITED STATES OF AMERICA,)	MEMORANDUM IN OPPOSITION TO
)	DEFENDANT SILVA'S MOTION TO
Plaintiff,)	DISMISS FOR SELECTIVE
)	PROSECUTION AND PURSUANT TO
v.)	THE COURT'S SUPERVISORY POWERS
)	
GLENIO JESUA FERREIRA SILVA,)	
)	
Defendant.)	Hearing Date: August 21, 2008, 2:30 pm
)	Courtroom: Floor 17, Ctrm 2

MEMORANDUM IN OPPOSITION TO DEFENDANT SILVA'S MOTION TO DISMISS FOR SELECTIVE
PROSECUTION AND PURSUANT TO THE COURT'S SUPERVISORY POWERS - CR 07-678 JSW

1 The defendant has failed to adduce any evidence in support of the threshold
 2 showing to support a claim of selective prosecution. And, he provides no support for his
 3 Motion to Dismiss pursuant to the Court's supervisory powers. For the reasons set forth
 4 below, his Motion to Dismiss should be denied.

5 I. BACKGROUND

6 The complaint and indictment charging the defendant with one count of Alien
 7 Harboring, in violation of Title 8 of the United States Code, section 1324(a)(1)(A)(iii)
 8 followed a lengthy investigation in which ICE Agents engaged in surveillance of Silva's
 9 businesses from March 2007 through execution of search warrants in June 2007. *See*
 10 *generally Complaint, ECF Docket No. 1 and Indictment, ECF Docket No. 21*. This
 11 investigation was conducted by the ICE, Worksite Enforcement Unit, which investigates
 12 matters concerning the unlawful employment, smuggling, and harboring of certain aliens
 13 in violation of Title 8, United States Code, Sections 1324 et. al. *See Declaration of ICE*
 14 *Special Agent Christopher Purfeerst ("Purfeerst Declaration"), ¶ 2, ECF Docket No. 64*.
 15 Contrary to defendant's assertions, the investigation and prosecution of Silva was not
 16 motivated by or related to his race, religion, sex, national origin, or other arbitrary
 17 classification. *See Purfeerst Declaration, ¶ 3, ECF Docket No. 64*. The case was
 18 investigated after worksite enforcement was set as an ICE priority in early 2007. *See*
 19 *Purfeerst Declaration, ¶ 2, ECF Docket No. 64*.

20 On May 15, 2008, this Court heard and denied the Defendant's Motion to Compel
 21 Discovery, *ECF Docket No. 57*, in support of a claim of selective prosecution. *See*
 22 *Minute Order, dated May 15, 2008, ECF Docket No. 70*. In denying the defendant's
 23 Motion, this Court held that

24 in *Armstrong*, the Supreme Court held that with respect to the
 25 discriminatory-effect element in a case of selective
 26 prosecution based upon race, this requires a defendant to put
 27 forth some evidence that, quote, "similarly situated defendants
 of other races could have been prosecuted but were not." End
 quote. And, that's at 469 of that case.

1 *Transcript of Proceedings, dated May 15, 2008, Exhibit 4* to Barton Declaration, p. 11.

2 Th Court further ruled that

3 In this case, the defendant attests that the United States
 4 Attorney's Office has chosen to prosecute only three Work
 5 Site Enforcement cases. And, notwithstanding that, and
 6 notwithstanding the offers that are made by Counsel, the
 7 defendant has not put forth any evidence regarding those
 8 cases it has - - that the Government has chosen not to
 9 prosecute. Instead, the defendant appears to rely on the
 10 description of the Work Site Enforcement program, and
 contents that this case and the other cases that have been
 prosecuted do not fall within its parameters. Thus, even if the
 defendant's theory is that the Government is acting in an
 arbitrary fashion with respect to the prosecution of these types
 of cases, the Court - - the record still fails to show evidence
 showing the manner in which the Government acted
 arbitrarily.

11 *Transcript of Proceedings, dated May 15, 2008, Exhibit 4* to Barton Declaration, pp. 12-
 12 13.

13 II. ARGUMENT

14 A. The Defendant Has Failed T Present Any Evidence In Support of His 15 Selective Prosecution Claim

16 It is well-established that the United States has broad discretion in charging
 17 decisions. *United States v. Wayte*, 470 U.S. 598, 607-608 (1985). "So long as the
 18 prosecutor has probable cause to believe that the accused committed an offense defined
 19 by statute, the decision whether or not to prosecute, and what charge to file or bring
 20 before a grand jury, generally rests entirely in [her] discretion." *Id.* Absent clear evidence
 21 that the government has not properly exercised its duties - such as a properly supported
 22 claim of selective enforcement - "courts can presume that [prosecutors] have properly
 23 discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

24 A selective prosecution claim is based in an equal protection standards, a
 25 protection against disparate treatment of similarly situated persons. To make out a claim
 26 of selective prosecution, the defendant must show that the prosecutorial policy

27 1) had a discriminatory effect and

2) was motivated by a discriminatory purpose.
United States v. Armstrong, 517 U.S. at 463-65 (1996); *United States v. Turner*, 104 F.3d 1180, 1184 (9th Cir. 1997)(“[t]he kind of intent to be proved is that the government undertook a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group.”)(quotations and citation omitted). In *Armstrong*, the Court held that “[w]e think the required threshold-a credible showing of different treatment of similarly situated persons-adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution.” *Armstrong*, 517 U.S. at 469-70.

In *United States v. Gonzales*, another district was presented with and denied a similar challenge that the one now raised by defendant. No. 07CR140-P.B., 2008 WL 160636 (N.D. Miss. January 15, 2008). In *Gonzales*, the defendants moved to dismiss the indictment on the ground of selective prosecution claiming that he was chosen for prosecution because he was Hispanic. As “proof” of his claim, he asserted that other contractors had illegal aliens on their payrolls but were not prosecuted. *Id.* at *9. The court held that the defendants (1) failed to make a prima facie showing of selective prosecution because they had failed to show that similarly situated contractors were not prosecuted and (2) failed to present any evidence aside from conclusory allegations that the Government prosecuted him based on his Hispanic origin. *Id.* Just as the defendant did in *Gonzalez*, the defendant in this case failed to provide evidence of selective prosecution but rather proffers unsupported claims of unfairness and arbitrary action. enforcement

Not only has the defendant failed to make the requisite threshold showing, he has outright failed to allege any discriminatory effect or purpose as a result of a protected class to which he belongs. As the Court held in *Armstrong*, “if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other [nationalities] races were being treated differently than respondent[].”

1 *Armstrong*, 517 U.S. at 470. It was not until the hearing on the *Motion to Compel*
 2 *Discovery* hearing that the defendant even identified “nationality” as the basis for his
 3 claim. *Transcript of Proceedings, dated May 15, 2008, Exhibit 4* to Barton Declaration,
 4 pp. 3-4. In neither the *Motion to Compel Discovery* nor the instant Motion has the
 5 defendant proffered any evidence that other persons of Portuguese nationality were being
 6 treated different than the defendant or that the prosecutorial action was motivated by
 7 discriminatory intent towards Portuguese nationals. The “new” evidence that is set forth
 8 as Exhibits B-F to the Declaration of Steven F. Gruel, *ECF Docket No. 78*, also fails to
 9 present any such proof. Neither a material witness’ testimony nor an Order of a State
 10 Labor Authority inform - either directly or indirectly - on the discriminatory effect or
 11 Government’s. This Court has already held that this type of evidence is not sufficient to
 12 make out a showing for discovery on a selective prosecution claim. *Transcript of*
 13 *Proceedings, dated May 15, 2008, Exhibit 4* to Barton Declaration, pp. 11-13. For the
 14 same reasons set forth by this Court in its May 15, 2008 opinion and those set forth above,
 15 this Court should deny defendant’s Motion to Dismiss.

16 **B. The Defendant Has Failed To State Any Grounds That Would**
 17 **Warrant Dismissal Pursuant the Court’s Supervisory Powers**

18 By his own admission, the defendant cannot direct the Court to any authority that
 19 supports his request for dismissal pursuant to the supervisory powers of the Court. In
 20 fact, no such authority exists. “The Supreme Court has recognized only three legitimate
 21 bases for the exercise of the supervisory power: to implement a remedy for the violation
 22 of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring
 23 that a conviction rests on appropriate considerations validly before a jury; and to deter
 24 future illegal conduct.” *United States v. Hasting*, 461 U.S. 499, 505-506 (1983). None of
 25 those considerations are at issue, or alleged to be at issue by the defendant, in this case.

26 Defendant’s incomplete and faulty interpretation of the evidence adduced at the
 27 material witness depositions does not support dismissal under this Court’s supervisory
 28

1 powers.¹ Further, neither of the cases cited by the defendant support his request. In
 2 *United States v. Hasting*, to remedy what it perceived to be a repeated practice by
 3 prosecutors in the circuit to comment on the silence of the defendant, the circuit court, in
 4 an exercise of its supervisory powers, reversed a conviction in which the prosecutor
 5 purportedly made such a comment without engaging in a harmless error analysis. 461
 6 U.S. at 505-506. The Supreme Court held that this action by the court was an improper
 7 exercise of supervisory powers and reversed. *Id.* at 512. In *United States v. Simpson*, the
 8 district court twice dismissed an indictment on the grounds that the prosecution conduct
 9 was outrageous. 927 F.2d 1088, 1090 (9th Cir. 1991). The Ninth Circuit twice reversed
 10 the district court holding, in the last decision, that the district court had impermissibly
 11 exercised supervisory powers for conduct that occurred outside of the courtroom and had
 12 acted in a manner that violated the separation of powers doctrine. *Id.* at 1091.

13 This case is not one in which it would be appropriate or warranted for this Court to
 14 exercise its supervisory powers to dismiss the indictment. Accordingly, the defendant's
 15 Motion should be dismissed.

16 IV. CONCLUSION

17 For the reasons stated above, the United States respectfully requests that the Court
 18 deny the defendant's Motion to Dismiss in all respects.

19
 20 JOSEPH P. RUSSONIELLO
 21 United States Attorney

22 DATED: July 21, 2008

23 /s/
 24 DENISE MARIE BARTON
 25 Assistant United States Attorney

26 ¹ The last material witness deposition was not cancelled for the reason speculated by the
 27 defendant. Rather, the deposition was cancelled after defense counsel improperly used the prior
 28 material witness deposition as a discovery tool rather than to preserve trial testimony, the purpose
 of a material witness deposition.